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In the Supreme Court of the United States

OCTOBER TERM, 1977

ROOSEVELT PEABODY, PETITIONER

v.

UNITED STATES OF AMERICA

RAYMOND CASON, PETITIONER

v.

UNITED STATES OF AMERICA

HARRY THARP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 31-38)[1] is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1977. Petitions for rehearing with suggestions for rehearing *en banc* were denied on May 13, 1977. The petitions for a writ of certiorari in Nos. 76-1776 and 76-6907 were filed on June 13, 1977. The petition in No. 76-6926 was filed on June 14, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was a fatal variance between the government's proof at trial and the counts charging conspiracy (petitioners Peabody and Tharp) and racketeering (petitioner Tharp).

2. Whether the district court erred in refusing to grant the motions of petitioners Peabody and Tharp for a severance.

3. Whether hearsay statements of petitioner Cason and co-defendant Johnson were properly admitted into evidence against petitioner Tharp.

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[1] All "Pet. App." designations refer to the Appendix in No. 76-1776.

4. Whether petitioners Tharp and Cason were deprived of a fair trial when a government witness misidentified petitioner Cason as the person to whom he delivered a "kickback."

5. Whether petitioners Tharp and Cason were prejudiced by the prosecutor's reference in opening argument to tape recordings that were never introduced into evidence and by the inadvertent (and immediately corrected) submission of the recordings to the jury.

STATEMENT

On October 24, 1974, petitioners and four co-defendants were indicted in the United States District Court for the Eastern District of Illinois for various offenses related to the conduct of the affairs of the East Saint Louis School Board. Petitioners Peabody and Tharp were members of the board. Petitioner Cason was the school district's purchasing agent. Charles Merritts was president and Fred Kimbrough was a member of the board. Leonard Johnson was the school district's business manager. Ben Phillips was also a board member; his trial was severed.

The 21-count indictment charged offenses beginning in 1972 and continuing throughout most of 1974. Before trial nine of the counts, charging offenses before 1974, were severed. The counts remaining were numbers 8 and 11-21. Count 8 charged Merritts and Johnson with mail fraud, in violation of 18 U.S.C. 1341. Count 11 charged Merritts, Kimbrough, petitioner Peabody and petitioner Tharp with conspiracy

to extort money from a supplier doing business with the school district, in violation of 18 U.S.C. 1951. Counts 12, 13, and 17 charged Merritts with substantive violations of Section 1951. Counts 14, 15, and 16 charged, respectively, petitioner Cason, Johnson, and Kimbrough with substantive violations of Section 1951. Counts 18, 19, and 20 charged, respectively, petitioner Cason, Johnson, and Merritts with perjury before the grand jury investigating the extortion scheme, in violation of 18 U.S.C. 1623. Count 21 charged petitioners and their co-defendants with having engaged, in conducting the affairs of the school board, in acts of extortion and mail fraud amounting to a pattern of racketeering activity, in violation of 18 U.S.C. 1961-1963.

Following a jury trial, verdicts of guilty were returned on all counts except Count 17 (involving Merritts). Petitioners Peabody and Tharp were accordingly convicted on Count 11 (conspiracy) and Count 21 (racketeering).[2] Petitioner Cason was convicted on Count 14 (a substantive violation of 18 U.S.C. 1951), Count 18 (perjury), and Count 21. Petitioner Peabody was sentenced to two years' imprisonment and a fine of $5,000. Petitioner Tharp was sentenced two years' imprisonment and a fine of $5,000 on Count 11; on Count 21 he was sentenced to three years' imprisonment, all of which was suspended in

[2] The district court granted petitioner Peabody a new trial on Count 21 on the ground that there had been a variance between that count as drawn and the government's proof at trial (Pet. App. 28-30).

favor of probation, to be served consecutively to the sentence on Count 11. Petitioner Cason was sentenced to 18 months' imprisonment and a $5,000 fine on Count 14; to 18 months' imprisonment on Count 18, to be served concurrently with the sentence on Count 14; and to three years' imprisonment on Count 21, all of which was suspended in favor of probation, to be served consecutively to his other sentences. The court of appeals affirmed (Pet. App. 31-38).

The evidence at trial showed that in 1974 petitioners and their co-defendants were engaged in a scheme by which they unlawfully obtained money paid by the school district upon false invoices approved by petitioners and also "kickbacks" from those doing business with the school district. In March 1974 Marvin Schwartz, an independent contractor with the school district, submitted $4,498.48 in false invoices on instructions from co-defendants Merritts and Johnson. The school district paid the invoices, and on April 11, 1974, Schwartz returned $4,000 of the money to Merritts for his reelection campaign (Tr. 886-895). James Kammermeyer, president of World Wide Industries, Inc., made numerous "kickback" payments to petitioners and their co-defendants between March and September 1974 in consideration of supply contracts with the school district.[3]

[3] For example, on April 8 Kammermeyer gave Merritts $500 (Tr. 1376-1377). On April 10 he gave Cason $500 to be divided equally between Peabody and Tharp (Tr. 1372, 1377-1378). Kammermeyer also purchased a set of golf clubs in April that he gave to co-defendant Johnson for delivery to

ARGUMENT

1. Kammermeyer's testimony regarding "kickbacks" to petitioners and the other board members included mention of (1) a calculator and a tape recorder given to petitioner Peabody; (2) a request by Peabody for a washer and a dryer; (3) a set of golf clubs given to Johnson for delivery to petitioner Tharp; and (4) $500 given to petitioner Cason to be divided equally between petitioners Peabody and Tharp (Tr. 1362-1366, 1372, 1377-1378, 1414-1415). These particular "kickbacks" were not mentioned in the indictment. Petitioners Peabody (Pet. No. 76-

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Tharp (Tr. 1414-1415). In early May, at a meeting attended by Kammermeyer, co-defendant Kimbrough, and petitioners Tharp and Peabody, "kickback" percentages were discussed and Kammermeyer gave Peabody a tape recorder and a calculator (Tr. 1362-1366). In June and July, Kammermeyer cashed several World Wide Industries checks payable to him and delivered the proceeds to petitioners or their co-defendants. See Tr. 1378, Gov't Ex. 8C (May 30 check for $600, $500 of which was delivered to Cason); Tr. 1381, Gov't Ex. 8D (June 13 check for $750, $500 of which was delivered to Johnson); Tr. 1382, Gov't Ex. 8E (June 11 check for $1,200, all of which was delivered to Merritts); Tr. 1383, Gov't Ex. 8F (June 10 check for $1,500, $1,000 of which was delivered to Johnson and $500 of which was delivered to Cason); Tr. 1385, Gov't Ex. 8G (June 21 check for $2,500, all of which was delivered to Merritts); Tr. 1385-1386, Gov't Ex. 8H (June 25 check for $1,250, $1,000 of which was delivered to Johnson); Tr. 1389, Gov't Ex. 8J (July 19 check for $1,000, $500 of which was delivered to Johnson and $500 of which was delivered to Cason); Tr. 1390-1391, Gov't Ex. 15 (check for $5,500, $1,500 of which was delivered to Johnson and $1,000 of which was delivered to Cason). In early August Kammermeyer gave co-defendant Kimbrough a check for $5,000 and $250 in cash (Tr. 1416-1418).

1776, pp. 13-21) and Tharp (Pet. No. 76-6926, pp. 18-22) contend that their use in evidence at trial resulted in a fatal variance between the government's proof and the crimes charged in Counts 11 (the conspiracy) and 21 (racketeering) of the indictment.

Petitioner Peabody raised this issue in a post-trial motion for a new trial, which the district court granted in part, ruling that the evidence had caused a variance with respect to the racketeering count but not the conspiracy count (Pet. App. 28-30). Petitioner Peabody continues to claim that he is entitled to a new trial on the conspiracy count as well. Petitioner Tharp, unlike petitioner Peabody, did not move for a new trial in the district court; he now seeks a new trial on both counts.

Petitioners' claims are unpersuasive. Count 11 charged petitioners Peabody and Tharp, as well as co-defendants Merritts and Kimbrough, with conspiring to obtain property from Kammermeyer with Kammermeyer's consent induced under color of official right, in violation of 18 U.S.C. 1951.[4] Nine overt acts, "among other acts," were specified: (1) in May 1974 petitioner Tharp telephoned Kammermeyer to announce a forthcoming visit by school board members to the latter's office; (2) both petitioners and Kimbrough went to Kammermeyer's office; (3, 4) there they told Kammermeyer that he must make "kickbacks" and that the payments were to be made

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[4] We have lodged a copy of the indictment with the Clerk of this Court.

to Merritts; (5) Kammermeyer called Merritts, who ratified the instructions and said that the payments would be shared by everyone; (6) Kammermeyer paid Merritts $30,000 pursuant to the arrangement; (7) in July 1974 Merritts, Kimbrough, and petitioner Peabody discussed the "kickback" payments; and (8, 9) in September and October 1974 petitioner Tharp met with Kammermeyer and discussed further "kickback" arrangements. Each of these overt acts (with only minor variations in the dates and the amount of "kickbacks" paid) was proven through the testimony of Kammermeyer (Tr. 1316, 1362-1366, 1373, 1378-1391, 1399-1417). See Pet. App. 34-35, 37. That the government introduced proof of other overt acts as well did not cause a variance, for "the Government is not limited in its proof at trial to those overt acts alleged in the indictment." *United States* v. *Adamo*, 534 F. 2d 31, 38 (C.A. 3), certiorari denied *sub nom. Kearney* v. *United States*, 429 U.S. 841. See also, *e.g.*, *United States* v. *Quesada*, 512 F.2d 1043, 1046 (C.A. 5), certiorari denied, 423 U.S. 946; *United States* v. *Clay*, 495 F.2d 700, 706 (C.A. 7), certiorari denied, 419 U.S. 937; *Napolitano* v. *United States*, 340 F.2d 313, 314 (C.A. 1).

The foregoing decisions recognize that "[t]he essence of the charge [of conspiracy] is a criminal agreement." *United States* v. *Armone*, 363 F.2d 385, 400 (C.A. 2), certiorari denied, 385 U.S. 957. "[T]he Government is under no obligation to prove every overt act alleged" in the indictment (*United States* v. *Adamo*, *supra*, 534 F.2d at 38; see also *United*

States v. *Williams*, 474 F.2d 1047 (C.A. 5)): proof of any one overt act is enough (*United States* v. *Cassell*, 452 F.2d 533, 536 (C.A. 7); *Bradford* v. *United States*, 413 F.2d 467, 469 (C.A. 5)). Indeed, in acknowledgement of the fact that the illegal agreement is the essence of the crime of conspiracy, it has frequently been held that even when the government fails to prove any overt act alleged in the indictment, but proves an unalleged overt act, the variance is not fatal. *E.g.*, *United States* v. *Adamo*, *supra*, 534 F.2d at 38-39; *United States* v. *Fassoulis*, 445 F.2d 13, 19 (C.A. 2), certiorari denied, 404 U.S. 858; *Brulay* v. *United States*, 383 F.2d 345 (C.A. 9), certiorari denied, 389 U.S. 986; *United States* v. *Armone*, *supra*; *Napolitano* v. *United States*, *supra*; *United States* v. *Negro*, 164 F.2d 168, 173 (C.A. 2); *Culp* v. *United States*, 131 F.2d 93, 100 (C.A. 8); *Worthington* v. *United States*, 1 F.2d 154, 155 (C.A. 7), certiorari denied, 266 U.S. 626; but cf. *United States* v. *Davis*, 533 F.2d 921, 929 n. 11 (C.A. 5).

In short, here the government proved all nine overt acts alleged in the indictment to have furthered the conspiracy; the introduction of evidence regarding additional overt acts did not defeat the government's case on Count 11.

It is the same with regard to petitioner Tharp's claim of a variance under Count 21. That count charged that petitioners and their co-defendants

> unlawfully and knowingly did conduct and participate directly and indirectly, in the conduct of [the school board's] affairs through a pattern of

> racketeering activity, in that the defendants did unlawfully affect commerce by obtaining property from [Kammermeyer, with his] consent induced under color of official right, said acts being a violation of * * * Section 1951 * * *. In this regard the Grand Jury incorporates by reference Counts VIII, XI, XII, XIII, XIV, XV, and XVI of this indictment. * * * [5]

Petitioner Tharp's claim is not that the indictment failed to state an offense under the Anti-Racketeering Act; rather, he asserts that there was a variance between the proof and the indictment caused by the government's introduction into evidence of "kickbacks" that were not specified in the indictment. But just as the government is not limited to proof of the overt acts charged in an indictment for conspiracy, there is no reason to limit the government's proof in an Anti-Racketeering Act case to the acts amounting to "a pattern of racketeering activity" that are mentioned in the indictment. Here the government proved numerous payments by Kammermeyer to Merritts that were made at the insistence of petitioner Tharp and his co-defendants and that were to be shared among them. These payments were alleged in Count 21 by that count's incorporation by reference of Count 11, which charged that pursuant to the conspiracy among the defendants Kammermeyer paid "$30,000

[5] Counts 12 through 16 (each of which the government proved at trial) charged petitioner Cason and co-defendants Merritts, Johnson, and Kimbrough with substantive violations of Section 1951 stemming from their receipt of "kickbacks" from Kammermeyer.

more or less" to Merritts for distribution among the school board members. Each payment exacted from Kammermeyer could have been considered a separate act of racketeering [6] for purposes of showing "a pattern of racketeering activity" under Section 1962 (see *United States* v. *Parness*, 503 F.2d 430, 438 (C.A. 2), certiorari denied, 419 U.S. 1105; *United States* v. *Moeller*, 402 F. Supp. 49, 58 (D. Conn.)), and the fact that petitioner Tharp may have committed and the government offered proof of other acts that might also have been considered among those constituting "a pattern of racketeering activity" did not vitiate the conviction. See *United States* v. *Parness*, *supra*.[7]

2. Petitioners Peabody (Pet. No. 76-1776, pp. 21-26) and Tharp (Pet. No. 76-6926, pp. 34-37) claim that the district court erred in not granting their motions for a severance. Each argues that if he were tried separately, co-defendants Merritts and Cason might have testified favorably to him.

The general rule is that "persons jointly indicted should be tried together." *United States* v. *Kahn*, 381 F.2d 824, 838 (C.A. 7), certiorari denied, 389 U.S.

[6] The district court correctly charged the jury that to convict petitioners Peabody and Tharp on Count 21 it would have to find beyond a reasonable doubt that each committed at least two criminal acts in violation of 18 U.S.C. 1951 (Tr. 2471).

[7] We accordingly believe that the district court erred in granting petitioner Peabody a new trial on Count 21. In any event, petitioner Peabody's windfall does not entitle petitioner Tharp (who did not join in petitioner Peabody's post-trial motion in the district court) to a new trial on the racketeering charge.

1015. This is particularly so where, as here, all of the defendants are charged with participation in the same conspiracy. *Ibid.* In such a case, to succeed on a motion for a severance "[t]he moving party must show that he will be unable to obtain a fair trial without severance, not merely that a separate trial will offer a better chance for acquittal" (*United States* v. *Allstate Mortgage Corp.*, 507 F.2d 492, 495 (C.A. 7), certiorari denied, 421 U.S. 999), and the disposition of such a motion is committed to the sound judgment of the trial judge, whose decision is reviewable only for an abuse of discretion. *Schaffer* v. *United States*, 362 U.S. 511.

The possibility that a co-defendant may be willing to testify favorably to the movant only if the latter is tried separately is one factor to be considered by the district court in passing on a motion to sever (*United States* v. *Shuford*, 454 F.2d 772 (C.A. 4)), but it does not, standing alone, inevitably require that the motion be granted. *United States* v. *Cruz*, 536 F. 2d 1264, 1267-1268 (C.A. 9); *United States* v. *Finkelstein*, 526 F.2d 517, 523-524 (C.A. 2), certiorari denied *sub nom. Scardino* v. *United States*, 425 U.S. 960; *United States* v. *Kahn*, *supra*, 381 F.2d at 841. The strength of the defendant's interest in a separate trial depends upon many factors, including the likelihood that his co-defendant will in fact testify and the significance of the exculpatory testimony that the defendant asserts will be forthcoming. *United States* v. *Finkelstein*, *supra*. Judged according to these standards, the district court's refusal to grant petitioners a severance was not an abuse of discretion.

Petitioner Peabody suggests (Pet. No. 76-1776, pp. 21, 25) only that Cason would have denied acceptance of one of the many "kickback" payments made by Kammermeyer—the April 10 payment to him of $500 to be divided equally between Peabody and Tharp (see note 3, *supra*). In light of the government's proof of many other "kickbacks" by Kammermeyer to all the defendants, this testimony can hardly be said to have been of such substantial value to petitioners as to require a severance.

Petitioner Peabody claims (Pet. No. 76-1776, p. 21) that he wished to call Merritts and Kimbrough simply to testify about "the operation" of the school board and does not indicate how such testimony would have aided his defense. Petitioner Tharp suggests (Pet. No. 76-6926, p. 34) that Merritts might have testified as he did before the grand jury, *i.e.*, that he knew of no wrongdoing by any board member. But Merritts was convicted of perjury for this very testimony (and the transcript of his grand jury testimony (Gov't Ex. 33) was accordingly before the jury in any case). Whether he would have been willing to repeat the same testimony under oath a second time is therefore doubtful, and the testimony would have been subject to impeachment by evidence of the perjury conviction in any event. In these circumstances,[8] the court of ap-

[8] *United States* v. *Shuford*, *supra*, and *United States* v. *Echeles*, 352 F.2d 892 (C.A. 7), relied upon by petitioners, are distinguishable. In each case the exculpatory testimony of a co-defendant would, if believed, have exonerated the defendant.

peals correctly ruled that the district court did not abuse its discretion in refusing to grant separate trials.[9]

3. Petitioner Tharp complains (Pet. No. 76-6926, pp. 23-29) that the district court erred in admitting evidence of hearsay statements of co-defendants Johnson and Cason, who were not charged with conspiracy. But the existence of a conspiracy count is not a prerequisite for the introduction of hearsay statements of co-defendants commonly engaged in an illegal scheme (*United States* v. *Snow*, 521 F.2d 730, 736 (C.A. 9), certiorari denied, 423 U.S. 1090; *United States* v. *Snyder*, 505 F.2d 595 (C.A. 5), certiorari denied, 420 U.S. 993; Fed. R. Evid. 801(d)(2)(D) and (E)); proof of a concert of unlawful activity is sufficient.

Here the government proved such a concert of action. The proof of petitioner Tharp's role in the conspiracy charged was plainly sufficient (see pages 5-6 n.3, *supra*), and the involvement of Cason and Johnson in the unlawful scheme was shown by their own dealings with witness Kammermeyer.[10] Moreover, the

[9] The trial was not so lengthy or complex as to have prejudiced petitioners. The government proceeded to trial only on those counts charging offenses committed during a relatively short time span in 1974 (page 3, *supra*). Moreover, as the court of appeals observed (Pet. App. 34), "[t]he trial court carefully cautioned the jury each time testimony was received for merely a limited purpose or against only certain defendants, and carefully instructed the jury before it retired."

[10] Cason and Johnson accepted payments from Kammermeyer (*e.g.*, Tr. 1372, 1378, 1381, 1383). Both Cason and Tharp met with Kammermeyer on July 24, 1974, to discuss the "kickbacks" (Tr. 1397-1398), and Tharp had earlier participated in a meeting with Kammermeyer at which the "kickbacks" were discussed (Tr. 1362).

jury was properly instructed as to the admissibility of the statements of co-conspirators,[11] and there was no need for the court to give a limiting instruction

[11] The court charged the jury (Tr. 2466-2467):

> In determining whether a conspiracy existed, the jury should consider the actions and declarations of all of the alleged participants. However, in determining whether a particular defendant was a member of a conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed, and that he was one of its members.
>
> Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of the members, then the statements thereafter knowingly made and the acts thereafter knowingly done, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such a conspiracy, and in furtherance of some object or purpose of the conspiracy.
>
> Otherwise, any admission or incriminatory statement made or act done outside of court by one person may not be considered as evidence against any person who was not present and did not hear the statement made or see the act done.
>
> Therefore, the statements of any conspirator which are not in furtherance of the conspiracy or made before its existence or after its termination may be considered as evidence only against the person making them.

each time such testimony was introduced. *United States* v. *Buschman*, 527 F.2d 1082 (C.A. 7).

4. Petitioners Tharp (Pet. No. 76-6926, pp. 32-33) and Cason (Pet. No. 76-6907, p. 4) complain that they were prejudiced when a government witness, called to impeach co-defendant Johnson, incorrectly identified petitioner Cason (rather than Johnson) as the person to whom he had been instructed by Kammermeyer to deliver a set of golf clubs. As the court of appeals observed (Pet. App. 37), when this happened "the witness was immediately excused, his testimony stricken, and the jury admonished to entirely disregard it."

Petitioner Tharp asserts that he was prejudiced because he was alleged to have been the ultimate recipient of the golf clubs. Petitioner Cason claims that his inability to cross-examine the witness resulted in a denial of his right to choose whether or not to take the stand. As the court of appeals ruled, however, the district court's prompt action removed any basis for these claims. Indeed, petitioner Cason does not suggest how, on cross-examination, he could have discredited the witness's testimony any more than it already had been by the district court.

5. Petitioners Tharp (Pet. No. 76-6926, pp. 30-31) and Cason (Pet. No. 76-6907, p. 4) contend that they were prejudiced by the prosecutor's reference in his opening statement to tape recordings that were never introduced into evidence [12] and by the inadvertent sub-

[12] The government decided not to offer the tapes for introduction into evidence because their sound quality was poor. (Pet. App. 35).

mission of the recordings to the jury. The court of appeals correctly ruled (Pet. App. 35-37), however, that the one passing reference to the tapes in the government's opening statement (Tr. 726) was not prejudicial given the overall evidence of petitioners' guilt, as well as the district court's instructions (Tr. 2454) and the prosecutor's own caution (Tr. 2346) that statements by counsel are not evidence.

The tapes were indeed inadvertently delivered to the jury room, but the jury inquired about them within fifteen minutes after they had retired to deliberate, and the court had them removed and advised the jury that they were not evidence in the case (see Tr. 2489-2490). As the court of appeals noted (Pet. App. 36), the delivery to the jury of exhibits not admitted into evidence requires reversal only if the defendant is prejudiced. See *United States* v. *Bishop*, 492 F.2d 1361 (C.A. 8), certiorari denied, 419 U.S. 833; *United States* v. *Burket*, 480 F.2d 568 (C.A. 2). Here the jury never listened to the tapes, and petitioners' speculation that the jurors may have inferred that the tapes were damaging to them and had been suppressed on some technical ground does not constitute a showing of prejudice sufficient to warrant reversal.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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